

DIMITAR SAVOV,  
Plaintiff,  
vs.  
IMMUNOTECH LABORATORIES, INC.,  
Defendant.

## ORDER GRANTING MOTION TO DISMISS

## I. BACKGROUND

<sup>1</sup> Because ECF Nos. 1-1 and 6 are identical copies of Plaintiff's Petition, this Order will address them both collectively as the Petition.

1 Plaintiff alleges that the former Immunotech CEO transferred its assets to another corporation  
 2 in 2018, Immunotech stopped operating medical trials, and Immunotech has failed to file  
 3 disclosures or hold shareholder meetings in recent years. (*Id.* ¶¶ 21, 9–19, 33–35).

4 An applicant for custodianship must also provide the following information, along with  
 5 an affidavit that the information is true and correct:

6 (e) Evidence of reasonable efforts by the applicant to contact the officers  
 7 and directors of the corporation for which the custodianship is sought.

8 (f) Evidence of a demand by the applicant to the officers and directors of  
 9 the corporation for which the custodianship is sought that the  
 10 corporation comply with the provisions of this chapter and that the  
 11 applicant did not receive a response.

11 NRS 78.347(2)(e–f).

12 After filing his petition for custodianship, the Clerk of Court entered default because  
 13 Immunotech had not appeared. (Clerk’s Entry Default, ECF No. 10). Once Plaintiff filed a  
 14 Motion for Default Judgment, (ECF No. 11), however, Immunotech filed a Counter Motion to  
 15 Set Aside Clerk’s Entry of Default, (ECF No. 13). The Magistrate Judge issued a Report and  
 16 Recommendation recommending that the Court grant Immunotech’s Counter Motion to Set  
 17 Aside Clerk’s Entry of Default. (R&R 6:24–27, ECF No. 28). The Court adopted the R&R.  
 18 (Order, ECF No. 31). Immunotech now moves to dismiss Plaintiff’s petition for custodianship  
 19 for failure to meet the requirements listed in NRS 78.347. (*See generally* Mot. Dismiss, ECF  
 20 No. 35).

## 21 **II. LEGAL STANDARD**

22 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon  
 23 which relief can be granted. Fed. R. Civ. P. 12(b)(6). A pleading must give fair notice of a  
 24 legally cognizable claim and the grounds on which it rests, and although a court must take all  
 25 factual allegations as true, legal conclusions couched as factual allegations are insufficient. *Bell*

1 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Accordingly, Rule 12(b)(6) requires “more  
2 than labels and conclusions, and a formulaic recitation of the elements of a cause of action will  
3 not do.” *Id.* “To survive a motion to dismiss, a complaint must contain sufficient factual  
4 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*  
5 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial  
6 plausibility when the plaintiff pleads factual content that allows the court to draw the  
7 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This standard  
8 “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

9 If the court grants a motion to dismiss for failure to state a claim, leave to amend should  
10 be granted unless it is clear that the deficiencies of the complaint cannot be cured by  
11 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant  
12 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in  
13 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the  
14 movant, repeated failure to cure deficiencies by amendments previously allowed, undue  
15 prejudice to the opposing party by virtue of allowance of the amendment, futility of the  
16 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

### 17 **III. DISCUSSION**

18 Defendant argues that Plaintiff’s petition should be dismissed because it fails to meet the  
19 requirements for an application of custodianship as laid out in NRS 78.347. First, Defendant  
20 argues that Immunotech has not abandoned its business because it filed for reinstatement with  
21 the Nevada Secretary of State prior to Plaintiff bringing his petition. (Mot. Dismiss 4:15–5:15).  
22 Second, Defendant claims that Plaintiff did not provide evidence of reasonable efforts to  
23 contact the officers and directors, because he attached a letter without evidence that it was ever  
24 sent. (*Id.* 5:16–6:24). Lastly, Defendant moves to dismiss on the grounds that Plaintiff did not  
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1 provide evidence of a demand that Immunotech comply with the provisions of the chapter. (*Id.*  
2 6:26–7:13).

### 3 **A. Abandonment**

4 NRS 78.347(1)(b) requires the corporation to have “abandoned its business” before a  
5 custodian will be appointed. Defendant claims that this requirement has not been met because  
6 it filed a Certificate of Reinstatement with the Nevada Secretary of State in 2021. (Mot.  
7 Dismiss 4:15–5:15). In response, Plaintiff points out that the NRS statute does not define  
8 “abandonment,” but that the Nevada Supreme Court has found that a corporation abandoned its  
9 business when it sold its restaurant or sold its real estate and personal property. (Resp. 5:1–7,  
10 ECF No. 39). He also argues that whether Immunotech has abandoned its business is a factual  
11 matter to be addressed later in the proceedings. (*Id.* 6:17–21).

12 The Court agrees with Plaintiff that Immunotech’s potential abandonment is a question  
13 of fact to be determined based on consideration of all relevant facts and evidence in this case.  
14 Defendant offers no case law to suggest otherwise. Taking all factual allegations in the Petition  
15 as true, Plaintiff sufficiently alleges facts allowing the court to draw a reasonable inference that  
16 Immunotech has abandoned its business. Plaintiff alleges that in 2018, Immunotech CEO  
17 signed an Asset Purchase Agreement to transfer Immunotech assets for his personal benefit.  
18 (Petition ¶ 21). Immunotech also stopped operating certain medical trials. (*Id.* ¶¶ 9–19).  
19 Plaintiff further claims that Immunotech’s last disclosure on the OTC Market was published in  
20 February 2017, and that Immunotech failed to file an Annual Report with the Nevada Secretary  
21 of State from 2018 to 2021. (*Id.* ¶¶ 33–35). In 2021, the Immunotech CEO filed a Certificate  
22 for Reinstatement with the Nevada Secretary of State but failed to reply to Plaintiff’s  
23 communications. (*Id.* ¶¶ 36–38). When Plaintiff contacted Pacific Stock Transfer, the transfer  
24 agent for Immunotech, the Managing Director informed Plaintiff that the CEO had resigned in  
25 2019, “leaving Immunotech without management.” (*Id.* ¶¶ 29–40). No shareholder meetings

1 have been conducted since before 2019. (*Id.* ¶ 41). Thus, the Court does not dismiss the  
2 Petition for failure to allege abandonment.

### 3 **B. Reasonable Efforts to Contact**

4 Defendant next argues that Plaintiff did not provide “[e]vidence of reasonable efforts by  
5 the applicant to contact the officers and directors of the corporation for which the custodianship  
6 is sought,” per NRS 78.347(2)(e). It points out that Plaintiff does not attest that he made  
7 reasonable efforts, but rather, Plaintiff’s affidavit states that “[t]here are no known current  
8 officers for Immunotech. The last known officer was Harry Zhabilov who resigned in  
9 November 2019.” (Mot. Dismiss 6:12–14); (Petition at 12). In the allegations of the Petition,  
10 Plaintiff states that he sent a written demand to Zhabilov to inspect Immunotech records under  
11 NRS 78.257 and did not receive a response, but NRS 78.347(2)(e) requires evidence of this  
12 action. (*See* Petition at 12). Plaintiff does attach a letter to the CEO and President of  
13 Immunotech, however, the attachment is simply a copy of a letter and lacks evidence that the  
14 letter was ever sent. (Ex. H to Petition).

15 The letter alone is not sufficient evidence of an *effort* to contact an officer of  
16 Immunotech. The Court is left to assume that the letter was sent via mail or email, despite the  
17 fact that Plaintiff failed to attest that he made reasonable efforts to do so. Because this  
18 deficiency may be remedied through a proper affidavit and evidence that Plaintiff attempted to  
19 contact Immunotech officers by sending the letter he attached, the Court grants Defendant’s  
20 Motion to Dismiss on this ground, and also grants Plaintiff 21 days to amend his petition.

### 21 **C. Demand for Compliance**

22 Defendant’s last argument is that Plaintiff failed to satisfy the NRS 78.357(f)  
23 requirement. The statute requires “[e]vidence of a demand by the applicant to the officers and  
24 directors of the corporation for which the custodianship is sought that the corporation comply  
25 with the provisions of this chapter and that the applicant did not receive a response.” NRS

1 78.357(f). Defendant claims that even if Plaintiff made a demand to inspect financial records  
2 pursuant to NRS 78.257, as alleged in the Petition, a demand to inspect financial records does  
3 not satisfy the requirement of evidence that the stockholder demanded that a corporation come  
4 into compliance with NRS 78.347. (Mot. Dismiss 6:25–7:6). Plaintiff leans on the phrase  
5 “comply with the provisions of this chapter,” and responds that he fulfilled the requirement  
6 because his demand to inspect records was made under NRS 78.257, part of NRS Chapter 78.  
7 (Resp. 7:14–8:2).

8 Defendant replies that a demand to inspect records does not provide notice to a  
9 corporation that it has failed to comply with Chapter 78. (Reply 3:17–20, ECF No. 40). It  
10 states that “failure to comply with a demand to inspect records gives rise to its own action  
11 pursuant to NRS 78.257(6),” suggesting that a stockholder may not bring an action for  
12 appointment of custodianship due to a corporation’s failure to comply with a records request.  
13 (*Id.* 3:20–24).

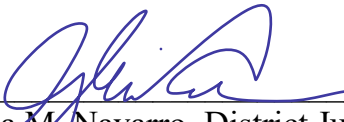
14 The Court agrees with Defendant’s logic and finds that it would be an absurd result to  
15 hold that a stockholder can make any type of Chapter 78 demand on a corporation to satisfy the  
16 demand required by a petitioner for custodianship. Chapter 78 covers 785 separate sections  
17 dictating Nevada Private Corporations law. Here, Plaintiff’s demand to inspect Immounotech’s  
18 financial records would not provide notice to Immunotech that Plaintiff was planning to file a  
19 petition for custodianship and allow Immunotech’s officers time to comply. Thus, the Court  
20 further grants Defendant’s Motion to Dismiss on the grounds of noncompliance with NRS  
21 78.357(f), but provides Plaintiff leave to amend.

22 **V. CONCLUSION**

23 **IT IS HEREBY ORDERED** that Defendant’s Motion to Dismiss, (ECF No. 35), is  
24 **GRANTED.**

1           **IT IS FURTHER ORDERED** that Plaintiff shall have 21 days from the date of this  
2 Order to file an amended petition. Failure to file an amended petition by the required date will  
3 result in the Court dismissing Plaintiff's petition without prejudice.

4           **DATED** this 18 day of January, 2024.

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8 Gloria M. Navarro, District Judge  
9 UNITED STATES DISTRICT COURT  
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